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No. 87-1759

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KENNETH WOOD, *et al.*,
Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 406, KROGER COMPANY and HAMADY BROTHERS FOOD MARKETS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT TEAMSTERS LOCAL 406 BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners seek review on writ of certiorari of five questions, four of which are adequately addressed in the briefs in opposition filed by other respondents. Respondent Teamsters Local 406 does not address those questions. More particularly, because these issues also bear directly on the claims against this respondent the Union concurs in and adopts the position taken by respondent Kroger on the three restated questions addressed in its brief in opposition. This brief in opposition will address question four in the petition for writ of certiorari, the only question which pertains exclusively to petitioners' claims against respondent Teamsters Local 406.

Question four relates to petitioners' claim to recover damages from respondent Union in the form of voluntarily incurred attorneys' fees for their counsel's participation in an arbitration where union counsel had principal responsibility for presenting their grievances. In the circumstances disclosed by the findings below, the question should be restated as follows:

Should this Court decide petitioners' claim for attorneys' fees where they chose to provide duplicative counsel who inappropriately attacked the adequacy of their union's representation before the arbitrator and then in an action to vacate an adverse award failed to establish a causal connection between the arbitrator's decision and their claim that the union's defense against their attack improperly influenced the arbitrator?

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RESPONDENT TEAMSTERS LOCAL 406 BRIEF IN OPPOSITION

The respondent, Teamsters Local 406, respectfully requests that the Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's decision in this case. That decision is reported at 807 F.2d 493 (1986).

STATEMENT OF THE CASE

This is a "hybrid" § 301 and duty of fair representation action arising out of an arms-length lease/sale by The Kroger Company (Kroger) of its Kentwood, Michigan grocery warehouse to Hamady Brothers Food Mar-

kets, Inc. (Hamady), an unrelated supermarket chain based in Flint.[1] In 1980 Kroger began pulling its business operations out of western Michigan. As part of this withdrawal Kroger initially sold 21 of its 35 stores in the area to Hamady and later, on August 6, 1980, entered into a lease/purchase agreement to transfer the warehouse assets to Hamady. Kroger ceased operations at Kentwood on October 18, 1980. Hamady took over the warehouse two days later.

Before the transfer Kroger employed 199 warehouse and truck driver employees at the Kentwood warehouse covered by a collective bargaining agreement with International Brotherhood of Teamsters Local 406 (Local 406, Union) effective until October, 1982. Section 1.3 of that contract provided that "[t]his Agreement shall be binding not only upon the parties hereto but upon their successors and assigns." The agreement also established a four-step grievance procedure which was the exclusive mechanism for resolving disputes over the interpretation or application of the contract. The fourth step in the procedure was final and binding arbitration.

Hamady planned to continue operating the warehouse to supply the stores it had acquired but to reduce the level of operations and, consequently, the number of employees. Hamady hired approximately half, i.e. 99, of the Local 406 members employed by Kroger but refused to assume Kroger's collective bargaining agreement and did not hire in order of seniority. Because it hired virtually all of its Kentwood employees from the Kroger

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[1] Petitioners have not heeded sound advice to avoid argument and editorializing in stating the facts. Stern, et al. *Supreme Court Practice* 371-372 (6th ed. 1986). Polemics and diatribes may sway a jury but are no substitute for an "accurate . . . summar[y] of the relevant facts and the treatment accorded those facts by the courts below." *Id.* Except as noted, what follows consists of findings actually made by the district court and court of appeals in the decisions below.

work force, Hamady recognized Local 406 as their collective bargaining representative and on September 29, 1980 opened formal negotiations for a new contract. The Union agreed to bargain upon the advice of counsel by letter dated September 22 that Hamady was not bound by the Kroger agreement.[2] On November 22, 1980 a settlement was reached and ratified by the membership.[3]

Hamady had disclosed its decisions not to accept Kroger's labor agreement and not necesasrily to hire by seniority at meetings with the Union and the members on September 15 and 27, 1980. On September 23, 1980, Local 406 informed Kroger by letter that the Union would hold Kroger responsible for any damages to the employees if Hamady did not assume the collective bargaining agreement. In early October Local 406 and certain employees filed grievances alleging that Kroger's agreement was binding on Hamady and that its successors and assigns provisions compelled Kroger to make Hamady assume the contract. Kroger denied the grievances at the first two steps and on December 18, 1980 they were deadlocked at step three of the grievance procedure, which entitled Local 406 to have the issue resolved by an arbitrator appointed by the Federal Mediation and Conciliation Service. However, in a rehearing at step three Kroger succeeded in having the deadlock vacated and the grievances denied and then refused to arbitrate. Local 406 had abstained from the rehearing proceedings because they were not authorized by the contract.

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[2] Local 406 had to resolve the successorship question presented by Hamady's takeover at that time or risk committing an unfair labor practice by refusing to bargain. See *Little Rock Mailers' Union No. 89*, 219 N.L.R.B. 707, 710; *District 1199 E, National Union of Hospital & Health Care Employees*, 238 N.L.R.B. 9, 15.

[3] The agreement expressly preserved the Union's right to pursue the grievances against Kroger. *Kroger Co.*, 78 L.A. 569, 575 (Howlett, 1982).

This action, claiming breach of contract by Kroger and Hamady and breach of duty by Local 406, was commenced by three plaintiffs on October 16, 1980,[4] but plaintiffs' motion to enjoin the sale was denied. On February 11, 1981 Local 406 brought suit against Kroger to compel arbitration of the grievances, and the district court consolidated the two actions. On May 21, 1981 the court ordered Kroger and Hamady to arbitrate the grievances, Kroger's objection concerning procedural arbitrability to be determined first, and granted plaintiffs the opportunity to participate in the arbitration through a spokesperson of their own. The court did not find that Local 406 had violated its duty; it gave Local 406 principal responsibility for presenting the grievances and permitted intervention because plaintiffs appeared to have lost confidence in the Union's representation, particularly with respect to their claims against Hamady.

An experienced and respected arbitrator heard the arbitrability issues on September 2, 1981; he ruled in the Union's favor and held hearings on the merits on September 21, 22 and 23, 1981. Plaintiffs were represented by two attorneys who participated fully in the hearings, presenting witnesses and evidence, cross-examining the witnesses of other parties, and submitting briefs. On September 2 the arbitrator allowed plaintiffs to present evidence that Local 406 had violated its duty of fair representation by not pressing Hamady forcefully enough to employ high seniority Kroger workers. Union counsel objected to such testimony and, after the objection was overruled, cross-examined the witnesses who gave it. Plaintiffs also offered in evidence selected documents they filed in this action to support that claim. In rebuttal to maintain a proper balance, Union counsel presented and the arbitrator accepted Local 406's respon-

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[4] Later the complaint was amended to name 35 additional plaintiffs. Only one of the 38 plaintiffs was hired by Hamady.

sive submissions in this action. One of them was counsel's September 22 letter to his client that Hamady was probably not bound by Kroger's labor agreement and that Local 406's chances in arbitration against Kroger were about 50-50. Later the arbitrator declined to hear the unfair representation claims and, before the award issued, returned these exhibits, including the September 22 letter.

On January 8, 1982 the arbitrator issued an award denying all grievances, *Kroger Co.*, 78 L.A. 569 (Howlett). In an 82 page opinion which the Sixth Circuit termed "thorough and supported by the evidence", 807 F.2d at 501, the arbitrator concluded that Hamady was not a successor bound by Kroger's labor agreement under either federal or state law. He also concluded that under the contract language Kroger was not required to make Hamady assume the labor agreement as a condition of the transfer. This award was final and binding, in accordance with the collective bargaining agreement.

After the award issued plaintiffs moved to vacate the decision, alleging that the Union breached its duty during the hearings. The court denied motions by Local 406 and Kroger to strike plaintiffs' jury demand and for summary judgment. The court refused to grant class status to plaintiffs in part because of the possible conflict of interest between the ninety-nine who were hired by Hamady and the remainder who were not. The court also ruled that plaintiffs could recover damages from Local 406 in the form of their attorneys' fees if union breaches occurred during the arbitration proceedings even if plaintiffs did not prevail against the employer under the collective bargaining agreement.

The trial was bifurcated and the liability issues tried first. During the six week trial the only evidence plaintiffs offered from which a jury could infer that union breaches contributed to the erroneous outcome of the arbitration was expert testimony that a hypothetical ar-

bitrator might be influenced by signals from union counsel that the client did not want to win the case. The court refused to admit the arbitration award into evidence although it did permit testimony relating to it.

At the close of plaintiffs' case the court granted Hamady's motion to dismiss on the ground that Hamady was not a successor and obligated to assume Kroger's collective bargaining agreement. The court denied motions to dismiss by Local 406 and Kroger based upon the testimony of plaintiffs' expert and the trial court's view that the successors and assigns language was ambiguous, and hence that whether it required Kroger to sell subject to the contract was a question of fact for the jury.

At the close of the evidence the trial court instructed the jury that if it found that the Union breached its duty and that the breach undermined the arbitral process, it should determine whether Kroger breached the collective bargaining agreement. The instructions also permitted the jury to find that Local 406 breached its duty apart from the arbitration without determining that the breach was the but-for cause of plaintiffs' injury. Finally, the court's instructions failed to provide the jury with the definition of successor under federal law and to advise that Hamady had been dismissed because it was not a successor to Kroger. The jury found that Local 406 had breached its duty by its conduct apart from and by its action in the arbitration hearing with respect to both the claims against Hamady and those against Kroger. It also found that the Union's breach had undermined the arbitration process and that Kroger had breached its contract by failing to require that Hamady assume the agreement.

The district court denied motions by Local 406 and Kroger for judgment notwithstanding the verdict or for a new trial. The trial court later certified five questions for interlocutory appeal, and the court of appeals ac-

cepted the appeal. The five questions included whether plaintiffs were entitled to a jury trial, whether there could be any recovery for union conduct apart from the arbitration or regarding the claim against Hamady, and whether the jury was properly instructed regarding the arbitrator's decision. Plaintiffs' appeal from the dismissal of Hamady was consolidated with the appeals by Kroger and Local 406.

The court of appeals, applying this Court's holding in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 524 (1976), held that the arbitration award could not be vacated unless the union breached its duty in the arbitration and the breach tainted the arbitrator's decision, i.e. contributed to the erroneous outcome of the arbitration. It found no evidence from which the jury could find that the union's breach contributed to the erroneous outcome of the arbitration, assuming the outcome was erroneous. The court of appeals also held, based upon this Court's decision in *Hines* and other cases, that Local 406 was not liable to plaintiffs for any breaches during the arbitration because the arbitrator determined there was no wrong of the employer that resulted in their loss. With respect to union conduct apart from the arbitration the court of appeals held, in agreement with all other federal courts of appeal, that a union is not liable for breach of duty absent evidence that but for the union's conduct the employee would not have been injured, and ruled that in this case plaintiffs had presented no evidence to establish this causal connection.

Finally, the court of appeals denied plaintiffs' claim for attorneys fees for their counsel's services in the four day arbitration. It declined to follow the circuits that have granted recovery of damages in the form of attorneys' fees for breach of duty where plaintiff did not also prevail on the merits of the grievance because it was contrary to federal labor policy and against sound judicial policy. Such claims, it held, must be examined on a

case-by-case basis. Accordingly, the court of appeals reversed the district court's denial of the motions by Local 406 and Kroger for judgment notwithstanding the verdict and remanded with instructions to confirm the arbitration award.[5]

REASONS WHY THE PETITION SHOULD BE DENIED

There are no special and important reasons for granting the petition for writ of certiorari in this case as required by Rule 17 of this Court. Respondent Kroger's brief in opposition demonstrates why the holding below with respect to the arbitration award follows applicable decisions of this Court and does not conflict with the decision of any court of appeals. It also demonstrates why there is no reason for the Court to review the jury trial question in this case. Respondent Hamady's brief in opposition demonstrates why there is no reason for the Court to review the fact-intensive questions involving successor liability resolved in the decision below. Local 406's brief in opposition will address only the issue as to whether this Court should grant certiorari with respect to plaintiffs' claim for damages in the form of attorneys' fees for their counsel's services in the arbitration.

I. The Decision Below Raises No Issue Not Already Resolved By This Court.

The Sixth Circuit's refusal to permit plaintiffs to recover damages in the form of attorneys' fees from the union for their counsel's services in the arbitration rep-

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[5] In a separate concurrence one judge expressed full agreement with the court's analysis but thought the court should resolve the "important issue" of whether the right to a jury trial exists in hybrid actions of this kind. In his view duty of fair representation claims and the question of whether the award must be set aside must be decided by the court. Plaintiffs had a right to trial by jury only on their breach of contract claim. The court's opinion expressed "no disagreement" with this analysis but found it unnecessary to reach the jury trial issue.

resents an unexceptionable application of an established precept of this Court. This Court has ruled no less than three times in three key cases that plaintiffs cannot "prevail" against their union, let alone recover damages from it, unless they can also show that the employer violated the collective bargaining agreement.

> To prevail against either the company *or* the union, petitioners must show not only that their discharge was contrary to the contract but also carry the burden of demonstrating breach of duty by the union.[6]

The reason for permitting employees to recover damages such as attorneys' fees from the union in breach of duty of fair representation cases is that it is a measure of the extent by which the union's breach of duty adds to the difficulty and expense of collecting from the employer.

> Were it not for the union's failure to represent the employee fairly, the employer's breach "could [have been] remedied through the grievance process to the employee-plaintiff's benefit."[7]

Thus, because there was nothing plaintiffs were entitled to collect from Kroger, they cannot recover attorneys' fees or other damages from Local 406 for alleged breach of duty in the unsuccessful arbitration. For the same reason, plus another, they cannot recover damages for pursuing their claim against Hamady in the arbitration.[8]

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[6] *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. at 570 (emphasis added). *See also United Parcel Service v. Mitchell*, 451 U.S. 56, 62 (1981) and *Clayton v. United Automobile Workers*, 451 U.S. 679, 683 n.4 (1981).

[7] *Bowen v. United States Postal Service*, 459 U.S. 212 (1983); *cf. id.* at 236, n.6 [dissenting opinion].

[8] The arbitration against Hamady should never have taken place because the district court failed to determine prior to the arbitration that Hamady was contractually bound to arbitrate the grievance. *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. ——, 106 S.Ct. 1415 (1986).

The court below correctly determined that a contrary rule permitting plaintiffs to recover their costs of litigation where they prove breach of duty but no underlying contractual right would violate sound judicial policy. It would encourage litigation in already overburdened courts and sap limited union treasuries with the cost of still more litigation by awarding attorneys' fees any time disgruntled employees can demonstrate a violation of duty in the grievance arbitration process even though the breach is harmless. Contrary to petitioners, deterrence of union misconduct has never been an absolute but merely one of several important considerations in the "careful balance of individual and collective interests which this Court has previously articulated in the unfair representation area." [9]

II. No Conflict Among The Circuits Exists Which Should Be Resolved By Review Of The Decision Below.

Although the Sixth Circuit's opinion expresses disagreement with decisions from other circuits that are contrary to the clear pronouncements of this Court, those holdings do not conflict with the decision below. In *Del Casal* [10] attorneys' fees for counsel retained by the grievant to present his unsuccessful discharge grievance before an airline system board were recovered from the union because its breach consisted of denying him routinely supplied union counsel for discriminatory reasons. In *Dutrisac* [11] the union breached its duty when it missed

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[9] *International Bhd. of Electrical Workers v. Foust*, 442 U.S. 42, 45 (1979); *Vaca v. Sipes*, 386 U.S. 171 (1967).

[10] *Del Casal v. Eastern Airlines, Inc.*, 634 F.2d 295 (5th Cir.), *cert. den.*, 454 U.S. 892 (1981).

[11] *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983). In rejecting the contention that the breach was not prejudicial the court of appeals reasoned that an arbitrator might have reached a different result or the employer might have offered to settle it before arbitration, *id.* at 1275, considerations that are obviously inapplicable here.

the time limit in appealing the plaintiff's discharge grievance to arbitration. The court sustained an award of $2000 in attorneys' fees for unsuccessfully litigating his discharge in the trial court because the union's breach deprived him of an arbitration that would have cost him nothing. The Ninth Circuit has now limited *Dutrisac* to cases where union misconduct is the "solitary and indivisible cause of the complete extinguishment of employees' grievance rights." [12] Thus in *Del Casal* the breach occurred before the arbitration and the award of attorneys fees measured the resulting loss. *Dutrisac*, too, is a case where the breach preceded the arbitration and could be remedied only by the employment of counsel.

Neither consideration applies in this case. The breach here for which attorneys fees are sought allegedly occurred during the arbitration hearings after plaintiffs retained counsel and chose to intervene in order to assist Local 406 counsel who under the court's order remained principally responsible for presenting the grievances. In short, unlike both *Del Casal* and *Dutrisac*, attorneys' fees are not recoverable here because they do not measure any loss caused by prior breach and because the alleged breach did not cause plaintiffs the complete loss of their grievance rights. On the facts found below, the Union's breaching conduct, i.e. expressing some doubt that the grievances could be won and taking an adversarial position *vis-a-vis* plaintiffs on the issue of the adequacy of the Union's efforts, would not warrant recovery of attorneys fees under the Fifth or the Ninth Circuit holdings.[13]

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[12] *Eichelberger v. Labor Board*, 765 F.2d 851 (9th Cir. 1985).

[13] No attorneys fees were awarded in *Stanton v. Delta Airlines, Inc.*, 669 F.2d 833 (1st Cir. 1982) and the court's discussion of *Del Casal* is pure dicta. 669 F.2d at 838. As its citations indicate, the Fourth Circuit's opinion in *Self v. Teamsters Local 61*, 620 F.2d 439 (4th Cir. 1980), like the *Del Casal* and *Stanton* opinion, confuse this Court's standards for determining liability with its formula for apportioning damages once liability has been established.

Moreover, no other court of appeals has awarded attorneys fees where alleged union misconduct was prompted by inappropriate and provocative conduct by plaintiff's representatives in the arbitration. The allegedly breaching conduct, which plaintiffs characterized as signalling the arbitrator that the Union did not desire to win the case, consisted of nothing more than Local 406 counsel's defense of his client from plaintiffs' attacks. On the findings below, 807 F.2d at 501, any contention that plaintiffs' counsel's participation in the arbitration was essential for a fair resolution of their complaint is blatant boot-strapping. Had plaintiffs not chosen to intervene in the arbitration or if their counsel had not injected evidence on an irrelevant and inflammatory issue at the arbitration hearings, the alleged misconduct would never have occurred. Because other circuits have not addressed claims for attorneys' fees in the context presented here, there is no actual or apparent conflict among the courts of appeal warranting review of the decision below.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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